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12 **UNITED STATES DISTRICT COURT**
13
14 **DISTRICT OF ARIZONA**
15

16 CENTER FOR BIOLOGICAL
17 DIVERSITY,

18 Plaintiff,

19 v.

20 UNITED STATES FISH & WILDLIFE
SERVICE,

21 Federal Defendant,

22 and

23 ARIZONA MINING ASSOCIATION,

24 Defendant-Intervenor.
25
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27
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CASE NO. 4:08-CV-00535-TUC-FRZ-DTF

STIPULATED SETTLEMENT

1 Plaintiff Center for Biological Diversity, Defendant United States Fish and
2 Wildlife Service (“Federal Defendant”), and Defendant-Intervenor Arizona Mining
3 Association (“AMA”), by and through their undersigned counsel, state as follows:

4 WHEREAS, Federal Defendant listed the Southwestern Willow Flycatcher, a
5 migratory songbird that nests in riparian vegetation in the southwestern portion of the
6 United States, as an endangered species under the Endangered Species Act (“ESA”) on
7 February 27, 1995. 60 Fed. Reg. 10694 (1995).

8 WHEREAS, Federal Defendant subsequently designated critical habitat for the
9 Southwestern Willow Flycatcher on July 22, 1997. 62 Fed. Reg. 44228 (1997).

10 WHEREAS, the 1997 critical habitat designation was found unlawful and set
11 aside. New Mexico Cattle Growers Ass’n v. U.S. Fish & Wildlife Serv., 248 F.3d 1277
12 (10th Cir. 2001).

13 WHEREAS, on October 19, 2005, Federal Defendant issued a revised critical
14 habitat designation for the Southwestern Willow Flycatcher. 70 Fed. Reg. 60886 (2005).

15 WHEREAS, on October 2, 2008, Plaintiff filed a complaint for declaratory and
16 injunctive relief alleging Federal Defendant’s revised critical habitat designation to be
17 arbitrary, capricious, and contrary to the ESA and Administrative Procedure Act
18 (“APA”).

19 WHEREAS, the parties, through their authorized representatives, and without any
20 admission or final adjudication of the issues of fact or law with respect to Plaintiff’s
21 claims, have reached a settlement that they consider to be a just, fair, adequate, and
22 equitable resolution of the dispute.

23 WHEREAS, the parties agree that settlement of this action in this manner is in the
24 public interest and is an appropriate way to resolve the dispute between them.

25 NOW, THEREFORE, THE PARTIES STIPULATE AND AGREE AS
26 FOLLOWS:

27 1. Federal Defendant agrees to a voluntary remand of the 2005 final critical
28 habitat rule and agrees to submit to the Federal Register a new proposed critical habitat

1 designation for the Southwestern Willow Flycatcher on or before July 31, 2011. Federal
2 Defendant shall submit to the Federal Register a final determination on the proposed rule
3 for the Southwestern Willow Flycatcher on or before July 31, 2012. During the pendency
4 of the voluntary remand and until the effective date of the new final critical habitat
5 determination, the October 19, 2005 designation of critical habitat for the Southwestern
6 Willow Flycatcher shall remain in place and be effective.

7 2. In consideration of the Federal Defendant's agreement to reconsider its
8 October 19, 2005 critical habitat rule and to meet the deadlines outlined above, Plaintiff
9 agrees to dismiss the present action with prejudice. Notwithstanding the dismissal of this
10 action, the parties respectfully request that the Court retain jurisdiction to oversee
11 compliance with the terms of this Agreement and to resolve any motions to modify such
12 terms. See Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375 (1994).

13 3. Any party may seek to modify the deadline for any actions specified in
14 Paragraph 1 prior to the passing of the deadline, for good cause shown, consistent with
15 the Federal Rules of Civil Procedure, by using the procedures specified in Paragraph 4.

16 4. The Order entering this Agreement may be modified by the Court upon
17 good cause shown, consistent with the Federal Rules of Civil Procedure, by written
18 stipulation between the parties filed with and approved by the Court, or upon written
19 motion filed by one of the parties and granted by the Court. In the event that a party
20 seeks to modify the terms of this Agreement, including the deadline for the actions
21 specified in Paragraph 1, or in the event of a dispute arising out of or relating to this
22 Agreement, the party seeking the modification or raising the dispute shall provide the
23 other parties with written notice of the claim. The parties agree that they will meet and
24 confer, either in person or otherwise, at the earliest possible time in a good-faith effort to
25 resolve the claim before pursuing relief from the Court. If the parties are unable to
26 resolve the claim within a reasonable time, either party may seek relief from the Court.
27 In the event that Federal Defendant fails to meet a deadline and has not sought to modify
28 it, Plaintiff's first remedy shall be a motion to enforce the terms of this Agreement.

1 Plaintiff's first motion to enforce the terms of the agreement shall not include a request
2 for contempt sanctions. Plaintiff, however, may file a motion seeking contempt sanctions
3 if Federal Defendant fails to comply with any subsequent Court order.

4 5. No party shall use this Agreement or the terms herein as evidence of what
5 does or does not constitute a reasonable time line for making a determination under 16
6 U.S.C. § 1533 or in any other proceeding regarding the Service's implementation of the
7 ESA.

8 6. Federal Defendant agrees that Plaintiff is the prevailing party in this action,
9 and agrees to pay Plaintiff's reasonable attorneys' fees and costs pursuant to section
10 11(g) of the ESA, 16 U.S.C. § 1540(g). Federal Defendant and Plaintiff agree to attempt
11 to resolve Plaintiff's claims for fees and costs expeditiously and without the need for
12 Court intervention. The Court shall retain jurisdiction over the case for the purpose of
13 resolving any dispute between the parties regarding Plaintiff's claims for an award of fees
14 and costs. If Federal Defendant and Plaintiff are unable to resolve attorneys' fees and
15 costs, Plaintiff shall file any motion seeking such award within 45 days of the order
16 adopting this Agreement. By this Agreement, Federal Defendant does not waive any
17 right to contest fees claimed by Plaintiff, including the hourly rate, in any continuation of
18 the present action or any future litigation.

19 7. Plaintiff reserves the right to seek from Federal Defendant additional fees
20 and costs incurred subsequent to this Agreement arising from a need to enforce or defend
21 against efforts to modify the underlying schedule outlined in Paragraph 1, or for any
22 other unforeseen continuation of this action. Federal Defendant reserves the right to
23 contest fees claimed by Plaintiff or Plaintiff's counsel, including the hourly rate, in any
24 future litigation, or continuation of the present action. Further, this stipulation as to
25 attorneys' fees and costs has no precedential value and shall not be used as evidence in
26 any other attorneys' fees litigation.

27 8. No provision of this Agreement shall be interpreted as, or constitute, a
28 commitment or requirement that Federal Defendant take action in contravention of the

1 ESA, the APA, or any other law or regulation, either substantive or procedural. Nothing
2 in this Agreement shall be construed to limit or modify the discretion accorded to Federal
3 Defendant by the ESA, the APA, or general principles of administrative law with respect
4 to the procedures to be followed in making any determination required herein, other than
5 as set forth in paragraph 1, or as to the substance of any final determination.

6 9. Nothing in this Agreement shall be interpreted as, or shall constitute, a
7 requirement that Federal Defendant is obligated to pay any funds exceeding those
8 available, or take any action in contravention of the Anti-Deficiency Act, 31 USC 1341,
9 or any other applicable appropriations law. Further, nothing herein shall obligate or
10 impose any obligation on the AMA to pay any fees and costs incurred by any other party
11 to this litigation.

12 10. The parties agree that this Agreement was negotiated in good faith and it
13 constitutes a settlement of claims that were vigorously contested, denied, and disputed by
14 the parties. By entering into this Agreement the parties do not waive any claim or
15 defense.

16 11. The undersigned representatives of each party certify that they are fully
17 authorized by the party or parties they represent to agree to the Court's entry of the terms
18 and conditions of this Agreement and do hereby agree to the terms herein.

19 12. The terms of this Agreement shall become effective upon entry of an order
20 by the Court ratifying the Agreement.

21 13. Upon approval of this Agreement by the Court, all counts of Plaintiff's
22 Complaint shall be dismissed with prejudice, pursuant to Federal Rule of Civil Procedure
23 41(a)(1).

24 RESPECTFULLY SUBMITTED this 13th day of January, 2010.

25 /s/ Geoff Hickcox (by RDT)
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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

CENTER FOR BIOLOGICAL
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UNITED STATES FISH & WILDLIFE
SERVICE,

Defendant.

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CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such to the attorneys of record.

/s/ Rickey D. Turner Jr.
RICKEY D. TURNER JR.